

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CAROLYN R. ANDERSON,)
Plaintiff,) No. CV-05-3106-CI
v.)
JO ANNE B. BARNHART,) ORDER GRANTING PLAINTIFF'S
Commissioner of Social) MOTION FOR SUMMARY
Security,) JUDGMENT AND REMANDING FOR
Defendant.) ADDITIONAL PROCEEDINGS
)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 16, 20), noted for hearing without oral argument on July 10, 2006. Attorney D. James Tree represents Plaintiff; Assistant United States Attorney Pamela J. DeRusha and Special Assistant United States Attorney Richard A. Morris represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 20).

JURISDICTION

On March 18, 2002, Carolyn R. Anderson (Plaintiff) protectively filed applications for disability insurance benefits and

1 supplemental security income benefits, alleging disability due to
 2 depression, a bad back, migraines and drug addiction (recovering),
 3 with an onset date of February 26, 1998. (Tr. 74, 84, 114.) The
 4 claim was denied initially and on reconsideration; a request for
 5 hearing was ultimately filed. After a hearing on July 21, 2004,
 6 Administrative Law Judge (ALJ) Verrell Dethloff denied benefits on
 7 May 19, 2005; the Appeals Council denied Plaintiff's request for
 8 review. The instant matter is before this court pursuant to 42
 9 U.S.C. § 405(g).

10 **STANDARD OF REVIEW**

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 12 court set out the standard of review:

13 A district court's order upholding the Commissioner's
 14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 15 Commissioner may be reversed only if it is not supported
 16 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 17 Substantial evidence is defined as being more than a mere
 18 scintilla, but less than a preponderance. *Id.* at 1098.
 19 Put another way, substantial evidence is such relevant
 20 evidence as a reasonable mind might accept as adequate to
 21 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 22 than one rational interpretation, the court may not
 23 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,
 25 resolving conflicts in medical testimony, and resolving
 26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 27 Cir. 1995). The ALJ's determinations of law are reviewed
 28 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

26 **SEQUENTIAL PROCESS**

27 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 28 requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

STATEMENT OF THE CASE

The facts have been presented in the administrative transcript, and discussed in the ALJ's decision, and will be summarized briefly here. At the time of the hearing, Plaintiff was 44 years old, with a tenth grade education. (Tr. 75, 429.) She had past work experience as a phone sales person, cashier, cook, bartender, espresso maker, apartment groundskeeper and cleaner. (Tr. 105.)

Plaintiff has a twenty-year history of polysubstance abuse and had been in Methadone treatment for six years at the time of the hearing. She testified she had relapsed on heroin six months prior to the hearing. (Tr. 407.) Plaintiff's last job was as a house

1 cleaner. She quit because she was having memory problems and her
2 mind was wandering. (Tr. 406.) Based on the ALJ's hypothetical
3 question, vocational expert William Weiss testified that Plaintiff
4 was capable of performing work as a sorter and semi-conductor
5 bonder. (Tr. 430-31.)

6 ADMINISTRATIVE DECISION

7 The ALJ determined Plaintiff had not engaged in substantial
8 gainful activity since the alleged onset of her disability. (Tr.
9 26.) At step two and three, ALJ Dethloff concluded Plaintiff had
10 severe mental impairments of drug and alcohol addiction, a
11 personality disorder, and depression NOS. He found the drug
12 addiction and polysubstance abuse met the listings under 12.09, but
13 since drug addiction and polysubstance abuse are factors material to
14 the finding of disability, a legal determination of disability due
15 to these impairments was disallowed. (Tr. 26.) He found severe
16 physical impairments of rotator cuff tendonitis, and degenerative
17 joint disease of the right knee but determined that, alone or in
18 combination with the other mental impairments, these remaining
19 severe impairments did not meet or equal the listings. (Id.) He
20 found Plaintiff's bulging disc and headaches to be non-severe. (Tr.
21 22.) The ALJ found Plaintiff's allegations regarding her
22 limitations were not fully credible. (Tr. 22, 26.)

23 Regarding Plaintiff's residual functional capacity (RFC), the
24 ALJ determined Plaintiff was capable of performing a light work with
25 only occasional reaching on the right, without close contact with
26 other people, and with supportive supervision. He found she was
27 able to perform her past relevant work as a house cleaner through
28 June 3, 2002, but unable to perform past relevant work as of June 4,

1 2002, due to reaching limitations. (Tr. 24, 26.) Based in part on
2 the vocational expert's testimony, the ALJ determined Plaintiff was
3 capable of performing work after June 4, 2002, as a sorter and semi-
4 bond conductor and, therefore, not disabled. (Tr. 27.)

5 **ISSUES**

6 The question presented is whether there is substantial evidence
7 to support the ALJ's decision to deny benefits and, if so, whether
8 the decision was based on proper legal standards. Plaintiff asserts
9 the ALJ erred when he (1) concluded Plaintiff's RFC did not support
10 a finding of disability; (2) provided an incomplete hypothetical to
11 the vocational expert; and (3) failed to fully and fairly develop
12 the record. (Ct. Rec. 18 at 12.)

13 **ANALYSIS**

14 The Social Security Act (SSA) provides that an individual is
15 not considered disabled if drug/alcohol addiction is a contributing
16 factor material to the Commissioner's determination that the
17 individual is disabled. 42 U.S.C. § 423(d)(2)(C). In determining
18 whether drug/alcohol addiction is a contributing factor material to
19 disability, the ALJ evaluates which, if any, of the individual's
20 physical and mental limitations would remain if the claimant stopped
21 using drugs or alcohol. 20 C.F.R. § 404.1535(b)(1). If
22 drug/alcohol addiction is a contributing factor material to a
23 finding of disability, benefits will be denied. *Id.*

24 In *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001), the
25 Ninth Circuit held that an ALJ must first conduct the five step
26 inquiry without separating out the impact of alcoholism or substance
27 abuse. If disability is found, and there is medical evidence of
28 substance abuse, the ALJ then considers what disabilities would

1 remain if the claimant stopped abusing drugs/alcohol. *Bustamante*,
 2 262 F.3d at 955. The ALJ may consult with a medical expert in
 3 determining what limitations remain without the effects of substance
 4 abuse. 20 C.F.R. §§ 404.1527 (f)(2)(iii), 416.927 (f)(2)(iii). It
 5 is the claimant's burden to produce evidence that drug addiction is
 6 not material to her disability. *Ball v. Massanari*, 254 F.3d 817,
 7 821 (9th Cir. 2001).

8 Here, the ALJ noted Plaintiff's diagnoses of opioid dependence
 9 and polysubstance abuse, and found at step two that Plaintiff had a
 10 severe mental impairment under Listing 12.09¹ due to substance
 11 abuse. He determined that this impairment met the Listing, but
 12 since Plaintiff's drug addiction and polysubstance abuse were
 13 factors material to the finding of disability, she was not disabled
 14 under the Social Security Act (Act). (Id.) The ALJ conducted a
 15 second evaluation of the medical evidence and Plaintiff's
 16 limitations without the effects of substance abuse and addiction and
 17 determined she was not disabled. (Tr. 23-24.) The ALJ's sequential
 18 evaluation conforms with the *Bustamante* standard.

19 A. Mental Limitations without the Effects of Drug Addiction

20 Once the effects of drug addiction were excluded, the ALJ found
 21 Plaintiff could perform light work with reaching only occasionally

22 ¹ Part 404, Subpt. P, App. 1, § 12.09, *Substance Addiction*
 23 *Disorders*, are defined as "Behavioral changes or physical changes
 24 associated with the regular use of substances that affect the
 25 central nervous system." Severity criteria are measured by
 26 reference to other impairment Listings, including organic mental
 27 disorders (12.02), depressive syndrome (12.04) and personality
 28 disorders (12.08).

1 on the right, with "no close contact with other people," and
2 "supportive supervision." (Tr. 24.) Plaintiff argues additional
3 mental limitations should have been included in the ALJ's
4 hypothetical to the vocational expert, and contends the ALJ
5 improperly rejected treating psychiatrist Jeffrey Jennings' opinions
6 in favor of non-treating psychologist Jay Toews, E.D.D. (Ct. Rec.
7 22 at 5-6.)

8 The ALJ is solely responsible for determining a claimant's RFC,
9 which is an administrative finding based on limitations and
10 restrictions attributable to medically determinable impairments.
11 *Social Security Ruling (SSR) 96-7p.* The RFC findings must be
12 supported by substantial evidence in the record. In determining a
13 RFC, the ALJ considers medical evidence from treating, examining and
14 non-examining doctors. If supported by the record, a treating or
15 examining physician's opinion is given more weight than that of a
16 non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592
17 (9th Cir. 2004). If the treating physician's opinions are not
18 contradicted, they can be rejected only with "clear and convincing"
19 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
20 contradicted, the ALJ may reject the opinion if he states specific,
21 legitimate reasons that are supported by substantial evidence. See
22 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
23 (9th Cir. 1995). To meet this burden, the ALJ can set out a
24 detailed and thorough summary of the facts and conflicting clinical
25 evidence, state his interpretation of the evidence, and make
26 findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.) (citing
27 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). The ALJ is
28 not required to accept the opinion of a treating or examining

1 physician if that opinion is brief, conclusory and inadequately
2 supported by clinical findings. *Id.*

3 Historically, the courts have recognized conflicting medical
4 evidence, the absence of regular medical treatment during the
5 alleged period of disability, and the lack of medical support for
6 doctors' reports based substantially on a claimant's subjective
7 complaints of pain, as specific, legitimate reasons for disregarding
8 the treating physician's opinion. *See Flaten*, 44 F.3d at 1463-64.

9 Here, the ALJ found Plaintiff's statements regarding her
10 limitations were not fully credible. (Tr. 22, 26.) This finding
11 has not been challenged and is supported by substantial evidence in
12 the record. Thus, medical opinions based substantially on her self-
13 report are properly rejected. Further, in summarizing Dr. Jennings
14 reports, the ALJ noted inconsistencies and lack of support in the
15 record as a whole in Dr. Jennings' conclusions; he also noted Dr.
16 Jennings ratings were inconsistent with the Plaintiff's mental
17 health treatment notes. (Tr. 20, 21, 292) These are specific and
18 legitimate reasons for discounting a treating or examining doctor's
19 opinions. The ALJ also noted that in January 2002, Dr. Jennings
20 reported a "mild recurrence of symptoms due to social isolation and
21 threatened loss of her boyfriend." On examination he found her
22 alert, cooperative and well-oriented with good memory. (Tr. 21.)
23 Dr. Jennings' conclusory form summary relied upon by Plaintiff in
24 her argument is not consistent with Dr. Jennings' narrative, which
25 characterizes Plaintiff's condition as due largely to the illness of
26 her boyfriend. (Tr. 294-95.) The ALJ did not err in discounting
27 Dr. Jennings' findings of "marked" and "severe" limitations.

28 Dr. Billings concluded that Plaintiff suffered Major Depressive

1 Disorder, single episode, moderate, and polysubstance dependence,
2 sustained partial remission and noted memory deficits were probably
3 due to inattention. (Tr. 308-09.) Dr. Billings also noted
4 inconsistencies in Plaintiff's reported drug use and the lack of
5 reference to Plaintiff's drug addiction in her treating physician's
6 records. (Tr. 305.) Dr. Billings noted that Plaintiff would
7 perform better away from people. (Tr. 309.) The ALJ incorporated
8 this limitation into his RFP.

In addition to testifying at the hearing as a medical expert,² Dr. Toews completed a post-hearing psychological evaluation based on objective testing and a client interview in which Plaintiff reported relapsing every two-three months. (Tr. 361, 363.) Since Dr. Toews is an examining doctor, the ALJ's reliance on his opinions is not error, as long as they are supported by substantial evidence. Further, neither Dr. Jennings nor Dr. Billings administered objective testing; their reports are based on Plaintiff's unreliable self-report. (Tr. 293-95; 304-09.) The ALJ noted that Dr. Toews' objective tests results underscored the lack of reliability in Plaintiff's self report. (Tr. 22.) (Tr. 363.) Based on Plaintiff's statements to Dr. Toews', the ALJ found her "opioid dependent, methadone." (Tr. 23.) This is consistent with both Dr. Jennings' and Dr. Billings' diagnoses of polysubstance dependence. However, since they concluded her dependence was in remission based on her unreliable self report, the ALJ did not err in discounting

² Testimony of a medical expert may serve as substantial evidence when supported by other evidence in the record. *Andrews*, 53 F.3d at 1041 (citing *Magallanes*, 881 F.2nd 747, 753 (9th Cir. 1989)).

1 their opinions regarding the severity of her limitations. In light
2 of the medical record in its entirety, Plaintiff's 20-year heroin
3 addiction, her credibility and her post-hearing disclosure of
4 frequent relapse, the ALJ's RFC findings and hypothetical question
5 were reasonable and supported by substantial evidence.

6 | B. Vocational Expert Testimony

7 Where, as here, a claimant's RFC includes non-exertional
8 limitations, evidence from a vocational expert is required in
9 assessing an individual's ability to work past jobs and other work
10 in the national economy. *Light v. Social Sec. Admin.*, 119 F.3d 789,
11 793 (9th Cir. 1997). Based on a hypothetical describing an
12 individual of Plaintiff's age, education and work experience, and
13 with the above restrictions, the vocational expert opined the
14 individual could perform her past job as house cleaner prior to the
15 onset of her reaching limitations; afterwards, she could perform the
16 jobs of sorter³ and semi-conductor bonder. (Tr. 430.) Plaintiff
17 argues that because the vocational expert opined her employability
18 would depend upon the degree of supervision she needed, the ALJ did
19 not have substantial evidence on which to find she could perform the
20 work identified by the vocational expert. She also argues the

³ The Commissioner concedes the vocational expert's testimony regarding the "sorter" position was in error (Ct. Rec. 21 at 18); therefore, the ALJ's finding regarding this work is not based on substantial evidence. This leaves only the position of semiconductor bonder as work Plaintiff can perform. As discussed below, the vocational expert testimony does not provide substantial evidence on which to base a step five finding that Plaintiff can perform this work.

1 Dictionary of Occupational Titles (DOT) definition of semi-conductor
2 bonder requires more than her RFC, as found by the ALJ. (Ct. Rec.
3 18 at 13.)

4 As stated in the Social Security Regulations, "an individual's
5 failure, because of his impairment, to perform ordinary or simple
6 tasks satisfactorily without supervision or assistance beyond that
7 usually given other individuals performing similar work, may
8 constitute evidence of an inability to engage in substantial gainful
9 activity." The need for supervision, however, does not preclude
10 employment. *Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir.
11 1982) (emphasis added); see also, 20 C.F.R. §§ 404.1573(b)(c),
12 416.973(b)(c).

13 The DOT indicates that the semiconductor bond job requires
14 working under specific instructions, involving "significant
15 tending," that requires "attaining precise set limits, tolerances
16 and standards." DOT, 726.685-066, Bonder, Semiconductor, 4th ed.
17 (revised 1991). The vocational expert testified that if the need for
18 supervision were "extreme," it would preclude competitive
19 employment. (Tr. 431.) The vocational expert did not elaborate as
20 to what would be "extreme" in the context of the semi-conductor
21 bonder job, and the ALJ did not pursue further questioning of the
22 vocational expert to obtain an explanation of when and how the need
23 for supervision would impact the hypothetical person's ability to
24 perform the job. Because the vocational expert's testimony is
25 ambiguous and possibly conflicts with the job requirements found in
26 the DOT definition, that conflict should be fully explained by the
27 vocational expert. SSR 00-4p. "Persuasive evidence" must exist in
28 the record to support the vocational expert's conclusions. *Pinto v.*

1 *Massanari*, 249 F.3d 840, 846 (9th Cir. 2001). Because the ALJ made
2 few step-five findings and relied on the unexplained conclusions and
3 inconclusive opinions of the vocational expert, it is difficult to
4 review his decision. See *Pinto*, 249 F.3d at 847. The step five
5 burden has not been met. *Tackett*, 180 F.3d at 1098-99, 1101;
6 *Erickson v. Shalala*, 9 F.3d 813, 818-19 (9th Cir. 1993).

7 **CONCLUSION**

8 The Commissioner did not meet her burden at step five to prove
9 Plaintiff can perform other work in the national economy. On
10 remand, Plaintiff may submit additional medical evidence which will
11 be considered in a new sequential evaluation process. If the
12 Commissioner proceeds to step-five, new vocational expert testimony
13 will be taken with consideration of all medically supported
14 limitations. *DOT* definition deviations will be noted and explained.
15 Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
18 **GRANTED**. The matter is remanded for additional proceedings pursuant
19 to sentence four of 42 U.S.C. § 405(g).

20 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
21 **DENIED**.

22 3. The District Court Executive is directed to file this Order
23 and provide a copy to counsel for Plaintiff and Defendant.

24 4. Judgment shall be entered for Plaintiff and the file **CLOSED**.

25 DATED August 11, 2006.

26
27

S/ CYNTHIA IMBROGNO
28 UNITED STATES MAGISTRATE JUDGE